Supreme Court, U. S.
FILED
AUG 9 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

NO. 78-230

Charles S. Kalav, Petitioner,

v.

United States of America, Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeal
For the Ninth Circuit

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. _____

CHARLES S. KALAV, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

CHARLES S. KALAV, petitioner, prays that a writ of certiorari issue to review the Memorandum of the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit Court"), filed and entered June 9, 1978.

OPINION BELOW

The Memorandum of the Ninth Circuit Court sought to be reviewed is reproduced in Appendix A, infra at page 30; it was not designated as "For Publication".

JURISDICTION

The Memorandum of the Ninth Circuit Court (Appendix A) was filed and entered on June 9, 1978. Rehearing of said Memorandum was sought by a timely filed Petition therefor; said Petition for Rehearing was denied by the Ninth Circuit Court by Order, filed July 14, 1978, a copy of which Order is reproduced in Appendix B, infra,at page 35. The jurisdiction of this Court is invoked under 28 U.S.C. § 1245(1).

QUESTION PRESENTED FOR REVIEW

Whether petitioner was denied the effective assistance of counsel at his criminal trial below, as guaranteed by the

Fifth and Sixth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the United States Constitution which provide as follows:

1. Amendment V: "No person shall... be deprived of life, liberty or property, without due process of law";

2. Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of Counsel for his defense."

STATUTES INVOLVED

The statutes under which petitioner was prosecuted and for the violation of which he was convicted are 18 U.S.C. §§ 1341 and 2314. The statute under which petitioner sought post conviction relief was 28 U.S.C. § 2255. Because these

provisions are lengthy, their pertinent text is set forth in Appendix D, infra, page 39.

STATEMENT

The facts necessary to place in its setting the question now raised may be briefly stated:

A. Course of proceedings in the case now before the Court.

On March 15, 1976 petitioner was indicted by a federal grand jury in United States of America v. Charles S. Kalav, said action bearing the number CR 76 325 FW in the files of the United States District Court for the Central District of California ("the Fraud Action"). The indictment was in seven (7) counts and charged petitioner with interstate transportation of money obtained by fraud (count 2) in violation of 18 U.S.C. §2314 and mail fraud (counts 1, 3, 4, 5, 6, and 7) in violation of 18 U.S.C. § 1314.

On May 10, 1976, petitioner was arraigned on the Fraud Action before the Honorable Francis C. Whelan, United States District Court Judge, petitioner entering a plea of "not guilty" as to each of the counts of the indictment, and the matter was set for jury trial.

On August 3, 1976, the trial on the Fraud Action commenced and on August 16, 1976, the jury returned a verdict of guilty on counts 2 through 7, the District Court having theretofore granted petitioner's motion for judgment of acquittal as to count 1 of the indictment.

On August 16, 1976, the District Court sentenced petitioner on the Fraud Action to the custody of the Attorney General for a period of eighteen months on counts 2, 3 and 4, each to run concurrently with the other, and suspended imposition of sentence on counts 5, 6 and 7 and imposed five years probation on each of these counts,

to run concurrently each with the other, but consecutively to the sentence imposed upon counts 2, 3 and 4.

On August 16, 1976, petitioner filed a Notice of Appeal from his conviction on the Fraud Action. (Petitioner's trial counsel has not represented petitioner subsequent to the filing of the said Notice of Appeal.)

On March 14, 1977, petitioner's Opening Brief was timely filed, on or about April 5, 1977 the Appellee's Brief was timely filed and on April 25, 1977 petitioner's Reply Brief was timely filed. The only ground of appeal addressed in petitioner's Opening and Reply briefs in the Fraud Action was that the District Court erred in not granting petitioner's motion for acquittal following the government's presentation of its evidence at trial.

On October 28, 1977, petitioner's appellate counsel mailed to the Ninth Circuit

Court an "Application to File a Supplemental Brief and to Postpone Argument", in which he contended that petitioner had been denied effective assistance of counsel at trial in contravention of petitioner's rights to due process of law under the Fifth Amendment to the United States Constitution and to effective assistance of counsel under the Sixth Amendment to the United States Constitution.

On November 1, 1977, while petitioner's appeal was pending in the Ninth Circuit Court, petitioner filed, in the District Court, a "Motion to Vacate, Set Aside, or Correct Sentence" ("the Petition") under 28 U.S.C. § 2255, which was assigned the number 77-4099-FW by the clerk of the District Court ("the Habeas Corpus Action"), and which attacked the legality of petitioner's conviction in the Fraud Action upon the ground that he did not have effective representation by trial counsel therein. The Petition consisted of the following:

(1) the District Court's form for such a petition, duly completed; (2) a Supplemental Memorandum of Points and Authorities in Support of the Petition; (3) an Affidavit of William Montgomery; (4) an Affidavit of petitioner; and (5) an Affidavit of Joel M. Lawlor, Esq., counsel for petitioner.

On November 2, 1977, Judge Whelan ordered ("the Order") the government in the Habeas Corpus Action to file a response to the Petition, and specifically required that the response include references to those portions of the reporter's transcript of the trial below relating to the alleged false and fraudulent representations of petitioner and the time or times when each of such representations was made.

On or about November 15, 1977, the government filed its response to the Petition in the Habeas Corpus Action, denominated "Government's Response to Motion Filed Pursuant to 28 U.S.C. § 2255; Memorandum of

Points and Authorities; Declaration of Anstruther Davidson; Exhibit" ("the Response").

On or about November 29, 1977, petitioner filed a reply to the Response in the Habeas Corpus Action, denominated "Reply of Defendant-Petitioner to Government's Response to Motion of Defendant-Petitioner Filed Pursuant to 28 U.S.C. § 2255; Memorandum of Points and Authorities in Support Therof" ("the Reply").

On February 3, 1978, the Ninth Circuit Court granted petitioner's Application to file a supplemental brief in the Fraud Action.

On or about February 17, 1978, petitioner's appellate counsel filed Appellant's Supplemental Brief in the Fraud Action, in which he detailed the manner in which petitioner was denied effective assistance of counsel at his trial.

On June 9, 1978, the Ninth Circuit Court filed its Memorandum in the Fraud Action

(Appendix A, infra, p. 30) in which the Court affirmed petitioner's conviction, determining (a) with respect to petitioner's claim that the District Court erred in not granting his motion for acquittal following the government's presentation at trial, that there was sufficient incriminating evidence before the jury to warrant the finding of guilt beyond a reasonable doubt, and (b) with respect to petitioner's claim that he was denied effective assistance of counsel, that petitioner did, in fact, receive effective assistance of counsel.

On June 23, 1978, petitioner filed with the Ninth Circuit Court (i) a Motion to Supplement the Record on Appeal to include the Petition, the Order, the Response and the Reply which were filed in the Habeas Corpus Action, and (ii) a Petition for Rehearing of the Memorandum in the Fraud Action.

On July 14, 1978, the Ninth Circuit

Court filed its Order (i) that the Motion to Supplement the Record be filed, (ii) that the Petition for Rehearing be filed, and (3) denying the Petition for Rehearing (Appendix B, infra, p. 35).

On July 19, 1978, petitioner filed with the Ninth Circuit Court an Application for Stay of Issuance of Mandate in the Fraud Action; on July 26, 1978, the Ninth Circuit Court filed its Order staying issuance of mandate until August 20, 1978 (Appendix C, infra, p. 37).

Copies of the Petition, Order, Response and Reply which were filed in the Habeas Corpus Action are annexed, as Exhibits "A", "B", "C" and "D", respectively, to petitioner's Motion to Supplement the Record on Appeal filed in the Fraud Action with the Ninth Circuit Court on or about June 23, 1978, and the affidavits of William Montgomery and petitioner, respecting petitioner's lack of effective assistance of

counsel at trial, are attached as Exhibits "B" and "C", respectively, to the Petition.

B. Relevant facts concerning petitioner's underlying convictions for mail fraud (18 U.S.C. § 1341) and interstate transportation of money obtained by fraud (18 U.S.C. § 2313).

Petitioner was convicted on one count of interstate transportation of money obtained by fraud (in violation of 28 U.S.C. § 2314) and five counts of mail fraud (in violation of 28 U.S.C. § 1341).

It is clear, from the proceedings prior to and at trial that the "theory" of the government's prosecution was that petitioner had defrauded numerous "investors" of money by knowingly making false and fraudulent representations, pretenses and promises. Specifically, the government contended that petitioner had made the following representations, pretenses and promises to various "investors": (1) that petitioner had

an option that would enable him to obtain stock in a corporation, known as GCI, and then to transfer said stock to persons who invested funds with him; and (2) that petitioner would return the full dollar amount of any "investment" (plus eight percent per annum interest) to all investors if petitioner was unable to deliver the subject stock. The government argued that these representations, pretenses and promises were false at the time petitioner made them, that petitioner knew them to be false, and that they were made as a part of a scheme and artifice to defraud the said "investors".

The indictment upon which petitioner was tried and convicted contained seven counts: count 1 alleged that on April 5, 1973, one Robert C. Vogel delivered a $1,000.00 check to petitioner, by mail, as and for an investment in GCI stock; count 2 alleged that on April 9, 1973, one Harry L. Page delivered a $10,000.00 check to petitioner,

by mail, as and for an investment in GCI stock; count 3 alleged that in June, 1973, one James S. Forrester delivered a $10,000.00 check to petitioner, by mail, as and for an investment in GCI stock; count 4 alleged that on August 6, 1973, one Robert J. Parker delivered a $5,000.00 check to petitioner, by mail, as and for an investment in GCI stock; count 5 alleged that on September 5, 1973, petitioner delivered a so-called "lulling letter", by mail, to Robert J. Parker, in connection with Parker's "investment", which was and is the subject matter of count 4; count 6 alleged that on September 11, 1973, one Dr. Spencer Koener delivered a $1,000.00 check to petitioner, by mail, as and for an investment in GCI stock; and count 7 alleged that on July 24, 1974, petitioner delivered a so-called "lulling letter", by mail, to Dr. Koener in connection with Koener's "investment", which was and is the subject matter of count 6.

The critical issue at the trial below was whether or not petitioner had a valid and binding option to purchase the stock of GCI on the dates and at the times of the events mentioned in the indictment.

The only testimony at the trial as to the nature, scope and duration of the subject option came from petitioner, who was the only witness who testified on behalf of the defense, and a government witness, named Patrick N. DiCarlo, who was, at all relevant times, the chief operating officer of GCI.

Respecting the option, DiCarlo testified, inter alia, as follows:

1. that it was not until May, 1973, that DiCarlo had any converations with petitioner respecting the details of the option that he admittedly gave to petitioner to purchase GCI stock, and that the said option was memorialized in a written option agreement, dated June 12, 1973;

2. that there were never any discussions between DiCarlo and petitioner regarding the value of GCI stock, and that he (DiCarlo) never told petitioner, as a certainty, that the par value of the stock was going to be reduced to $1 per share; and

3. that there was a Rescission Agreement, bearing the date of August 6, 1973, wherein the option given to petitioner to acquire GCI stock was rescinded and that (a) the first conversation between him (DiCarlo) and petitioner concerning the said rescission occurred approximately two or three days prior to August 6, 1973, (b) that there was a meeting on August 6, 1973, to discuss the said subject matter, and (c) that petitioner returned the Rescission Agreement, duly executed by petitioner, a few days thereafter.

Petitioner's testimony at his trial, respecting the nature, scope and duration of

the said option, was directly contradictory to the testimony of DiCarlo. Indeed, petitioner testified that at all times from and after March of 1973 and continuing until November of 1973, he had a valid, binding option to purchase at least two million shares of stock of GCI Corporation at no more than $1 per share.

At the time of petitioner's trial, he was incarcerated at the Los Angeles County Jail, serving a sentence imposed upon him after conviction for (an earlier and unrelated) federal income tax law violation. At his trial in the Fraud Action, a certified copy of his earlier conviction was introduced and presented to the jury, as affecting petitioner's credibility when he testified in his own defense.

When petitioner heard DiCarlo's testimony at trial, as outlined hereinabove, petitioner repeatedly advised his trial counsel that William Montgomery, if called as a

witness, could and would refute DiCarlo's testimony on each of the points outlined. Petitioner's trial counsel, however, failed and refused to locate Montgomery and call him as a witness on petitioner's behalf. As pointed out hereinabove, at the time of petitioner's trial in the Fraud Action he was incarcerated, hence, it was impossible for petitioner to locate Montgomery and arrange for his testimony. (See, Affidavit of Charles Kalav, annexed as Attachment "B" to petitioner's Supplemental Brief.)

Had William Montgomery been contacted by petitioner's trial counsel, interviewed and called as a witness for the defense, Montgomery would have testified consistent with petitioner and contradictory to DiCarlo as to the nature, extent and duration of the option petitioner received from DiCarlo, which testimony would have been of critical importance on the issue of petitioner's guilt or innocence. (See,

Affidavit of William Montgomery, annexed as Attachment "A" to petitioner's Supplemental Brief.

REASONS FOR GRANTING THE WRIT

The Court of Appeals had so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The only major issue at the trial below was whether or not petitioner had a valid and binding option to purchase stock of GCI on the dates upon which he said he had such an option. Petitioner testified that the option was granted in March, 1973 (well before any monies were delivered to him by the "investors") and was rescinded retroactively in or about October or November of 1973 (well after any monies had been delivered to him by the "investors").

DiCarlo testified that he gave petitioner the option in mid-June, 1973 and rescinded the option on or about August 6, 1973. Thus, the dates upon which the option was granted and rescinded were and are critical to the case.

Even the Ninth Circuit Court, in its Memorandum, recognized the importance, to petitioner's guilt or innocence, of his having the option that he said he did at the times he said he had it. In its discussion of the point, the Ninth Circuit Court stated "As it turned out, appellant did not have the option he said that he did." (See, Memorandum, Appendix A, infra, p. 30.)

At his trial, the evidence against petitioner was that either before mid-June, 1973 (the time at which DiCarlo testified he granted petitioner the subject option) or after August 6, 1973 (the time at which DiCarlo testified the said option was rescinded), petitioner engaged in acts which

expressly or impliedly indicated to others that he had the said option. However, the evidence in the record was and is that all of the monies were paid to petitioner, and the two so-called "lulling letters" were dated, no earlier than April 5, 1973 and no later than September 11, 1973, well within the period of time during which petitioner testified that he had the subject option.

It is understandable, though, how the jury could have convicted petitioner if the jury believed DiCarlo's testimony that petitioner only had an option to purchase GCI stock for a few weeks commencing on June 12, 1973 and terminating on or about August 6, 1973; as such, the payment of any monies to petitioner by the "investors" prior to June 12, 1973 or after August 6, or so 1973 would have been at a time when petitioner did not have the option. On the contrary, if the jury had believed petitioner's testimony to the effect that he had an option from

March of 1973 to November of 1973, the payment of monies to him during that entire period of time could not have supported his conviction.

At the time of petitioner's trial, William Montgomery, if called as a witness for petitioner would have testified contrary to DiCarlo and consistent with petitioner as to the nature, scope and duration of the said option, and the failure of petitioner's trial counsel to seek out and call Montgomery amounted to a denial of the effective assistance of counsel.

The jury, when it weighed petitioner's credibility as against DiCarlo's credibility was bound to "tip the scales" in favor of DiCarlo by virtue of the jury's awareness of petitioner's prior conviction. However, had Montgomery been contacted, interviewed, called as a witness for the defense and testified consistent with petitioner and contradictory to DiCarlo, it is entirely possible that the

jury would have "tipped the scales" in favor of petitioner.

Certainly petitioner was entitled, as a matter of constitutional imperative, to have Montgomery's testimony at least presented to the jury.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. While the Sixth Amendment's command is unambiguous, different appellate courts have enunciated differing standards by means of which the effectiveness of counsel is to be tested. For example, in the Ninth Circuit Court alone there are three standards: (1) performance so poor and incompetent as to make the trial a farce or mockery of justice (United States v. Stern, 519 F.2d 521, 524 (9th Cir. 1975); Wright v. Craven, 412 F.2d 915 (9th Cir. 1969); Dalrymple v. Wilson, 366 F.2d 183, 185 (9th Cir. 1966)); (2) circumstances showing

a denial of fundamental fairness (United States v. Stern, supra, at 525; Mengarelli v. United States, 476 F.2d 617 (9th Cir. 1973); Johnson v. Craven, 432 F.2d 418 (9th Cir. 1970)); and (3) lack of effective aid in the preparation and trial of the case -- lack of counsel likely to render and rendering reasonably effective assistance (Cooper v. Fitzharris, 551 F.2d 1162 (1977) rehearing granted; Leano v. United States, 457 F.2d 1208 (9th Cir. 1972); Brubaker v. Dickson, 310 F.2d 30, 37 (9th Cir. 1962)).

Regardless of what standard is chosen and applied, it cannot be disputed that a defendant is denied effective assistance of counsel if such defense counsel has not prepared and has not conducted the defense with reasonable knowledge and skill. In that regard, the Court's attention is directed to the American Bar Association Project On Standards For Criminal Justice, Standards Relating to the Defense Function (App.

Draft 1971) ("the Standards") which recognized that "investigation and preparation" are keys to effective representation. Minimally, this requires counsel to contact persons whom he knows or should have reasonably known were or are witnesses to the events in question; and to conduct these interviews and investigations as promptly after his appointment as is possible before memories fade or witnesses disappear. In that regard, the Commentary to the Standards, Section 4.1, provides that "[t]he relationship of effective investigation by the lawyer to competent representation at trial is patent for without adequate investigation he is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial or to conduct plea discussions effectively."

In its Memorandum, the Ninth Circuit Court made short shrift of petitioner's

contention that he was denied the effective assistance of counsel at his trial. In that regard, the Ninth Circuit Court's decision reflects its belief that the testimony of William Montgomery, if given at petitioner's trial, would have been of no consequence. It is respectfully submitted that the Ninth Circuit Court either overlooked or misapprehended the legal and factual effect of whether or not petitioner had the option that he claimed he had at the time he claimed he had it. Indeed, as pointed out hereinabove, in the portion of the Memorandum discussing the sufficiency of the evidence to support a finding at trial of petitioner's guilt, the Ninth Circuit Court made the statement "As it turned out, appellant did not have the option he said that he did," thus acknowledging the importance of that fact. The only evidence supporting the determination that petitioner did not have the option he said he had, of course, was the evidence of

the sole witness whose testimony would have been flatly contradicted had Montgomery testified.

In discussing petitioner's claim of ineffective assistance of counsel, the Ninth Circuit Court in its Memorandum stated that "even if all of [Montgomery's] testimony had been given, it would not have negated the elements of the crime. No defenses to the charge would have been presented." Again, it is respectfully submitted that had Montgomery testified at petitioner's trial, and had his (Montgomery's) testimony been believed, it would have compelled the conclusion that petitioner, indeed, had the option he claimed he had at the times he claimed he had it. That, of course, would have negated one of the elements of the crime, namely, that petitioner knew that the representations he was making were false at the time he made them, and would have constituted a defense to the charges. Indeed, whether or

not petitioner had the option was the cornerstone upon which the indictment was placed and was the foundation upon which the government's case was built. If petitioner either had the option he claimed he had or believed that he had the option, the case against him crumbles.

Petitioner's trial counsel did not contact, interview or call as a witness an individual who would have testified on behalf of petitioner and who would have contradicted a "key" prosecution witness as to the nature, scope and duration of the subject option; petitioner's trial counsel's failure to seek out and interview that witness was not supported by tactical considerations, informed or otherwise, violated said trial counsel's duty to conduct a factual investigation, and, hence, denied petitioner effective assistance of counsel.

CONCLUSION

It is submitted that, for the reasons set forth above, petitioner was not accorded effective assistance of counsel at his trial. Accordingly, this Petition for a Writ of Certiorari should be granted.

Dated: August 8, 1978

Respectfully submitted,

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APPENDIX A

FILED
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EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
vs.	)	No. 76-3618
CHARLES S. KALAV,	)	MEMORANDUM
Defendant-Appellant.	)	

Appeal from the United States District Court for the Central District of California

Before: TRASK and GOODWIN, Circuit Judges, and SOLOMON,* District Judge

Appellant, Charles Kalav, appeals from his jury conviction on five counts of mail fraud in violation of 18 U.S.C. § 1341 and one count of interstate transportation of

* Honorable Gus J. Solomon, Senior United States District Court Judge; for the District of Oregon, sitting by designation.

money obtained by false representation in violation of 18 U.S.C. § 2314.

In the initial round of briefs, appellant argued that the district court erred in not granting his motion for acquittal following the government's presentation at trial. Supplemental briefs were allowed to be filed on the issue of ineffective assistance of counsel.

The test for determining the validity of a decision denying a motion for acquittal is found in United States v. Scott, 452 F.2d 660, 662 (9th Cir. 1971):

> "The measure which the court must use to determine the validity of a motion for acquittal is whether the evidence is such that a jury might reasonably base a finding thereon that the accused is guilty beyond a reasonable doubt . . . . Should the court be of the opinion that prudent jurors might have no reasonable doubt, or might disagree
>
> [2]
>
> as to its existence, the matter lies within the jury's province and the motion must be denied." (Citations omitted)

The appeals court can examine all the

evidence presented at trial and does not have to limit itself to reviewing only that evidence admitted up to the time the motion was made. United States v. Martinez, 514 F.2d 334, 337 (9th Cir. 1975). See contra, Cephus v. United States, 117 U.S.App.D.C. 15, 324 F.2d 893 (D.C. Cir. 1963).

A review of the evidence here shows that the jury had more than enough incriminating material before it to find guilt beyond a reasonable doubt.

The fraudulent scheme was one in which appellant represented to four doctors that he had an option to purchase stock in an investment company called GCI. He offered to exercise these stock options using the doctors' money to buy shares on their behalf. Thereafter, by the organization of a limited partnership and a public offering, the heart and lung institute would be financed, the doctors would make a great deal of money and the International Heart

& Lung Institute (IHLI) would come into being. As it turned out, appellant did not have the option he said that he did. He took the money the doctors furnished and used it for his own living expenses and not for the purposes promised. He never paid back any part of the money; thus, finally the institute turned out to be a nightmare instead of a dream fulfilled.

No witnesses were produced by the appellant except Mr. Kalav himself. It is the function of the jury to determine who is telling the truth and who is not. Here, the jury believed the witnesses for the government and not the testimony of the appellant.

Appellant's allegations of ineffective assistance of counsel center on his trial attorney's failure to call a

[3]

witness -- William Montgomery. In an affidavit submitted to this court, Montgomery

refuted some of the testimony against appellant. But, even if all of his testimony had been given, it would not have negated the elements of the crime. No defenses to the charge would have been presented. The scope of pretrial investigation and choice of witnesses are matters of trial tactics which are generally not second-guessed by the appeals court. United States v. Ladley, 517 F.2d 1190, 1194 (9th Cir. 1975); United States v. Pearson, 482 F.2d 809, 811-12 (9th Cir. 1973). Under the three tests for ineffective assistance of counsel set out in DeKaplany v. Enomoto, 540 F.2d 975 (9th Cir. 1976), appellant did receive effective assistance of counsel.

Judgment is AFFIRMED.

APPENDIX B

FILED
JUL 14 1978

EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	No. 76-3618
CHARLES S. KALAV,	)	O R D E R
Defendant-Appellant.	)	

Before: TRASK and GOODWIN, Circuit Judges, and SOLOMON,* District Judge

The appellant's substitution of attorneys may be filed; the motion to supplement the record may also be filed.

Appellant's petition for rehearing received by the Clerk on June 23, 1978 (Memorandum filed by the court, June 8,

*Honorable Gus J. Solomon, Senior United States District Judge, for the District of Oregon, sitting by designation.

1978), is herewith ordered filed.

We have considered the documents and the panel has voted to deny the petition for rehearing.

The petition for rehearing is denied.

APPENDIX C

FILED
JUL 26 1978

EMIL E. MELFI, JR. CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	]	
	]	
Plaintiff/Appellee,	]	
	]	
vs.	]	No. 76-3618
	]	
CHARLES S. KALAV,	]	DC #Cv1724 RDF
	]	
Defendant/Appellant.	]	

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Joel M. Lawlor counsel for the appellant, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States

of a petition for writ of certiorari to be made by the appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before August 20, 1978.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/
Ozell M. Trask,
United States Circuit Judge

DATED: SAN FRANCISCO, CALIF.

APPENDIX D

18 U.S.C. §1341 provides, in pertinent part, that:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises , . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon . . . [shall be guilty of an offense against the laws of the United States]."

18 U.S.C. §2314 provides, in pertinent part, that:

"Whoever transports in interstate . . . commerce . . . money of the value of $5,000 or more knowing the same to have been taken by fraud . . ." [shall be guilty of an offense against the laws of the United States]".

28 U.S.C. §2255 provides that:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or

is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral

attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order

entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

Proof of Service by Mail

State of California)
) ss.
County of Los Angeles)

I, the undersigned, depose and say:

I am employed in the offices of Messrs. Youngman and Lawlor, attorneys of record for Petitioner herein;

I am over the age of eighteen and not a party to the within proceeding;

Our business address is 1801 Century Park East, Suite 1101, Los Angeles, California 90067;

On August 9, 1978, I served the foregoing Petition for a Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit upon the United States of America, Respondent herein, the only party required to be served,

- by enclosing three (3) true copies thereof, in a sealed envelope, with air

mail postage thereon, fully prepaid, addressed to The Solicitor General, 5614 Department of Justice, Washington D.C. 20530, and

- by enclosing three (3) true copies thereof, in a sealed envelope, with regular mail postage thereon, fully prepaid, addressed to the United States Attorney for the Central District of California, 312 North Spring Street, Los Angeles, California 90012, and

- by depositing the said two (2) envelopes in a United States post office mail box in Los Angeles, California.

Carole M. Ekker
Carole M. Ekker

Subscribed and sworn to before me, at Los Angeles, California, this 9th day of August, 1978.

Sandi Flanders
Notary Public in and for said State and County.

OFFICIAL SEAL
SANDI FLANDERS
NOTARY PUBLIC CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires June 17, 1979

[SEAL]

Supreme Court, U. S.
FILED
OCT 3 1978
MICHAEL RODAK, JR., CLERK

No. 78-230

In the Supreme Court of the United States

OCTOBER TERM, 1978

CHARLES S. KALAV, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOSEPH S. DAVIES, JR.
JODY M. LITCHFORD
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 30-34) is noted in a table at 577 F. 2d 752.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1978. A petition for rehearing was denied on July 14, 1978. The petition for a writ of certiorari was filed on August 9, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied effective assistance of counsel.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on one count of interstate transportation of money obtained by fraud, in violation of 18 U.S.C. 2314 (Count 2), and five counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 3, 4, 5, 6 and 7).[1] He was sentenced to three concurrent terms of 18 months' imprisonment on Counts 2, 3, and 4 and three concurrent terms of five years' probation on Counts 5, 6, and 7, to be served consecutively to the terms of imprisonment. The court of appeals affirmed (Pet. App. 30-34).[2]

The evidence at trial showed that in 1973, between April and September, petitioner offered four doctors an opportunity to buy stock in G.C.I. International (G.C.I.); petitioner represented to each one either that he had an option on the stock or would be able to make it available for purchase (Tr. 53-54, 88-92, 117, 157-159). Between April and September, the doctors mailed checks to petitioner in varying amounts, totaling $31,000, to

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[1]Counts 2, 3, 4, and 6 involved payments to petitioner. Counts 5 and 7 involved "lulling letters" sent by petitioner to two of the victims. A motion for judgment of acquittal was granted on Count 1, which involved a payment made to a person who testified that he had never spoken with or seen petitioner (R. 36, Tr. 46). "R." references are to the "Clerk's Record" prepared by the Clerk for the court of appeals. "Tr." references are to the transcript of the proceedings in the district court.

[2]While petitioner's direct appeal was pending in the court of appeals, he filed a motion in the district court, pursuant to 28 U.S.C. 2255, attacking his conviction on the ground of ineffective assistance of counsel (Pet. 7). The district court did not rule on the motion, but petitioner obtained leave from the court of appeals to raise the issue there by filing a supplemental brief in his pending direct appeal (Pet. 9).

purchase the stock (Tr. 54, 90, 114, 158-159). On September 5, 1973, and July 24, 1974, petitioner sent letters to two of the doctors promising to deliver G.C.I. stock as soon as the option was exercised (Plaintiff's Exhibits 11, 13, and 14; Tr. 115-117, 160-161, 166). None ever received any stock, however, nor was any money refunded to them (Tr. 55, 96, 117, 164). At trial, petitioner took the stand and admitted that at the time he received the money, he did not intend to use it to purchase stock, but instead planned to use it for his personal living expenses (Tr. 408). He presented no other witnesses.

ARGUMENT

Petitioner asserts that his counsel was constitutionally ineffective because he failed to call as a defense witness a former associate of petitioner's, William Montgomery, to testify regarding the dates between which petitioner actually had an option to purchase G.C.I. stock.

As petitioner points out (Pet. 19-20), there was a conflict in the trial testimony over the dates when petitioner's option became effective and when it was rescinded. The government's witness, Patrick DiCarlo, chairman and chief executive officer of G.C.I., testified that the option was granted in July 1973 and rescinded in August 1973 (Tr. 263, 291). Petitioner testified that the option was in existence from March 1973 until October 1973 (Tr. 384, 403-404). An affidavit of Montgomery, filed by petitioner to supplement the record on appeal, indicates that Montgomery would have testified that the option existed from sometime in March 1973 to sometime in November 1973. Petitioner contends that this testimony "would have negated one of the elements of the crime, namely, that petitioner knew that the representations he was making were false at the time he made them" (Pet. 27).

As the court of appeals correctly found, however, Montgomery's testimony would neither negate an element of the crime of mail fraud nor establish a defense to it (Pet. App. 34). The elements of 18 U.S.C. 1341 are simply (1) a scheme to defraud and (2) the use of the mails in executing that scheme. *Pereira* v. *United States*, 347 U.S. 1, 8 (1954); *United States* v. *White*, 355 F. 2d 909, 910 (7th Cir. 1966). Proof that a defendant did not own or possess the property in question, although relevant to the question of intent to execute a fraudulent scheme, is not essential to establishing the violation. *United States* v. *White, supra*.[3] The trial testimony established that petitioner solicited money from the four victims for the purchase of G.C.I. stock (Tr. 53-54, 88-92, 117, 157-159), and petitioner himself testified that he did not intend to buy stock with that money (Tr. 408). This satisfies the elements of the crime of mail fraud and demonstrates that it was irrelevant whether petitioner *could* have bought the

[3]Although the indictment alleged that defendant made fraudulent representations, including the representation "[t]hat defendant had an option which could enable him to obtain G.C.I. stock and then to transfer said stock to other people" (R. 2), it is not the case, as petitioner claims (Pet. 27-28), that the alleged representation regarding possession of an option was "the cornerstone" of the indictment. That representation was alleged merely as one of the means employed by petitioner in obtaining money from the victims to purchase stock and then retaining the money for himself. The government need not prove every such allegation of an indictment charging a scheme to defraud in order to establish a violation of 18 U.S.C. 1341. *United States* v. *Amrep Corporation*, 560 F. 2d 539, 546 (2d Cir. 1977); *United States* v. *Joyce*, 499 F. 2d 9, 22 (7th Cir. 1974) cert. denied, 419 U.S. 1031. In any event, the receipt by one of the victims of a lulling letter in an envelope postmarked July 24, 1974 (Plaintiff's Exhibits 13, 14; Tr. 160-161, 166) shows that petitioner was maintaining the pretense regarding the stock option even after the time during which, according to either his testimony or Montgomery's affadivit, he possessed such an option.

stock. Thus, the court of appeals properly concluded (Pet. App. 34) that the decision of petitioner's counsel not to call Montgomery as a witness was simply a question of trial tactics, which courts should not attempt to second guess. *Salazar* v. *Estelle*, 547 F. 2d 1226, 1227 (5th Cir. 1977). In short, the circumstances here do not provide a basis for questioning trial counsel's effectiveness.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP G. HEYMANN
Assistant Attorney General

JOSEPH S. DAVIES, JR.
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OCTOBER 1978

[4]Although the courts of appeals have articulated different standards for assessing the effectiveness of counsel in criminal proceedings (see our opposition to the petition for a writ of certiorari in *Yelardy* v. *United States*, No. 77-6689; see also *Maryland* v. *Marzullo*, No. 77-784, cert. denied, May 1, 1978 (White J., dissenting)), this case presents no occasion for resolution of any conflict. Counsel's performance was more than adequate under any standard that might be applied.